BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area.	))))))	**ER-2007-0002**

RESPONSE OF NORANDA ALUMINUM, INC. TO AMERENUE MOTION TO CONSOLIDATE

COMES NOW NORANDA ALUMINUM, INC. ("Noranda") and offers this timely response to the July 19, 2006 Motion to Consolidate filed in this matter (and in Case No. GR-2007-0003) by AmerenUE as follows:

A. Noranda's Concerns.

1. Noranda is concerned about the implications of AmerenUE's Motion to Consolidate because that motion fails to distinguish what is actually being sought. These cases concern different service territories, different services and certainly different rates, rate structures and class cost of service analysis. There is no basis on which they should be consolidated ***substantively***. However, there is a way to address AmerenUE's concerns without raising deeper concerns.

2. We think that what AmerenUE seeking is a ***procedural*** consolidation similar to that the Commission and parties recognized in the recently-concluded Aquila electric and steam cases, Case Nos. ER-2005-0436 and HR-2005-0450. We believe that

these objectives can be accomplished without the additional complications of ***substantive*** consolidation, and certainly many of them can be accomplished without the necessity of a Commission order simply by the reasonable agreement of the parties to the proceeding. Were AmerenUE's request crisply limited to ***procedural*** or administrative matters, there would not be the level of concern that its present request generates.

a. *First*, filed in advance of identification of parties, and even the deadline for seeking intervention, such a motion is premature. The procedural deadline for intervention filings is July 31 [today]; the motion was filed on July 19. Surely parties timely petitioning for intervention should be permitted to react -- after their party status is established and the "cast of characters" has become more stable -- to the motions in both cases.[1/] In our sense it is procedurally inappropriate for any substantive motions dealing with procedure or other matters to be ruled upon until timely interventions have been determined and a formal list of parties to the proceeding established. Doing otherwise arguably denies due process to parties with clear and undisputed interests in the proceedings simply by permitting an end run around their rights. Legal rights are only recognized -- not created -- by sustaining an application to intervene. The Commission Staff is not the only party interested

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[1/] Noranda is, at this point, operating on an application to intervene. This application has not been opposed and far more than 10 days have elapsed from its filing. However, that application has not been granted as of this time.

in this proceeding or in this question, nor should Staff's position be presumed coincident with as yet unnamed parties.

b. *Second*, for ease of administration, we sense that AmerenUE would like to be able to file a combined pleading one time and have it recognized in both cases. This should not be a serious problem. While in this day of EFIS filing, accomplishing an electronic filing in two dockets is not greatly burdensome, certainly counsel can agree to such a process and its mechanics without difficulty. We also sense that, in a given set of facts, AmerenUE might well wish to preserve an ability to file a pleading individually in only one of the cases.

c. *Third*, AmerenUE legitimately may be concerned with administrative handling of data requests and, possibly, other discovery. Again, this is not a problem. Simply by agreement of affected counsel, a data request and its response that seeks or supplies common information can be related to the other case avoiding duplicative responses. This has been handled before simply by an agreement of counsel and, where needed, to address the respective provisions of the protective orders.

d. *Fourth*, avoiding sequential hearings should also not be an issue. In the recent Aquila electric and steam rate proceedings, the hearing was easily handled on an identical time track. Here the Commission has already set a "consolidated" schedule establishing one hearing, resulting in only one hearing and one transcript. Unless the current custom of issue-by-issue hearing is abandoned, unique issues can be intelligently handled.

3. All AmerenUE's reasonable concerns can easily be dealt with by a ***procedural*** consolidation like that employed in the Aquila cases. Moreover, they can be addressed without creating procedural or administrative difficulties for the Commission or the other parties.

B. Procedural But Not Substantive Consolidation is Acceptable.

1. Our concern is not with a procedural consolidation or accommodation such as AmerenUE reasonably seeks, but rather with the potential confusion of parties and interests that could result from a ***substantive*** consolidation.

a. *First*, there is the question of discovery and discovery access. The issues in the gas case will be similar on some issues and different on others. Gas rate design, rate structure and gas cost of service in many respects is considerably different than that employed in electric cases and often involves different considerations. Yet it might be argued that principles, experts, and testimonies in one case or the other ought to be considered in both. Since intervention is (or should be) limited to parties that have a pecuniary interest in the case under consideration, a party to an electric case may not necessarily have a pecuniary interest in the gas case, nor vice-versa.

Under Commission practice, full consolidation is perceived as making a party to case "A" a party to case "B" even though they did not choose to intervene in Case "B". In at least one recent instance, again in context of Aquila's last rate

proceeding, an intervening party to one of the rate cases did not wish to become a party to the preceding class cost of service case and aggressively resisted being compelled to participate in that different and essentially complete docket. Others who had participated throughout that earlier case also opposed such joinder. Consolidation would have frustrated both concerns.

Noranda appreciates that there is some law in other contexts suggesting that consolidation of cases does not result either in a full merger of the proceedings or a joinder of parties[2/] for all purposes. But carefully read, these decisions reinforce Noranda's concerns. Sadly, Commission proceedings tend to be less analytical and far less specific in rulings.

b. *Second*, there is the complicating factor of Article V Section 18 of the Missouri Constitution requiring Commission decisions be supported by competent and substantial evidence "on the whole record." In a substantive consolidation there could be only one "record," and its considerate creation could require attorneys to almost continually be making objections or submitting motions *in limine* to preclude particular pieces of evidence introduced in one case from being considered as part of the "record" in the other. This would make for an unnecessarily complicated and expensive hearing for parties such as Noranda that were interested only in a subset of issues in one

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[2/] *See, e.g. State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 929 (Mo. banc 1992) (husband's granted motion for new trial on a consortium claim did not operate to grant new trial on the companion matter of the wife's personal injury claim).

of the cases. Evidence "relevant" to issues in one case may not necessarily and automatically be equally "relevant" in the other. Moreover, even incompetent evidence may end up in the record of the proceeding because of failure to timely object.[3/]

c. *Third*, there is the question of the status of parties to object to a settlement in one case or the other. While some of the Commission's recent suspension orders are subject to varying interpretations,[4/] they can certainly be read to preclude a non-unanimous settlement. Since a given party to one action would become a party to the other by ***substantive*** consolidation, does it follow that they could be in a position to block settlement in the other case by withholding their consent in the first. Could a party hold out for a concession in their primary case of interest? Other variations could be developed. But these legally interesting and troublesome questions all can be avoided by a consolidation that is ***limited to administrative and procedural matters***. Of course, fully consolidated cases later could be "severed," but that would involve at least a motion, response time, and potentially a dispute, which would further complicate the already cumbersome settlement process. The parties ought to be able to focus their attention on resolv-

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[3/] *State ex rel. GS Techs. Operating Co. v. PSC of Mo.*, 116 S.W.3d 680, 687 (Mo. Ct. App. 2003).

[4/] And some remain subject to Applications for Rehearing, *see, e.g., In re Empire District*, Case No. ER-2006-0315.

ing disputes rather than using time to resolve needless procedural complexities.

C. Conclusion.

Noranda has sought here to note its concerns alongside the legitimate administrative concerns that we sense AmerenUE has. Noranda wishes to cooperate with the Commission and all parties to implement procedural efficiencies. Efficiency in process along with thoughtfully designed and carefully maintained separation of procedural and substantive concerns offers a solution to both concerns with little or no compromise of the administrative efficiency that we sense AmerenUE seeks.

Perhaps an appropriate approach that may result in an easy and mutually satisfactory resolution would be to accommodate a response by AmerenUE to this pleading, followed by a deferral of any ruling on the pending motions to consolidate until the prehearing conference that is presently scheduled in both cases on August 17. At that time the list of intervenors (timely and otherwise) can be established and any objections pertinent to those proposed interventions addressed. Thereafter, counsel for those parties can then address and explore expedient means to resolve these and other possible administrative matters to improve the processing of the case for all parties involved. We will be surprised if these and other administrative matters cannot be worked out to the reasonable satisfaction of all and in a way that accomplishes a satisfactory arrangement for AmerenUE

but without the additional concerns of a full substantive consolidation.

WHEREFORE, Noranda prays that the motion to consolidate be approved, but only insofar as the motion requests an administrative and procedural consolidation of this matter with Case No. GR-2007-0003, and that ruling thereon be deferred until the parties to both cases have had an opportunity to discuss the matter at the early prehearing presently scheduled for August 17. 2006.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

Stuart W. Conrad 23966
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

ATTORNEY FOR NORANDA ALUMINUM, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by electronic means or by U.S. mail, postage prepaid, addressed to all parties by their attorneys of record as disclosed by the pleadings and orders herein.

Stuart W. Conrad

Dated: July 31, 2006